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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 544

DEXTER C. SHOULTZ, *Petitioner,*

vs.

MELVIN LAIRD, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner Dexter C. Shoultz prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 27, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix I) is not as yet reported. The opinion of the United States District

Court for the Northern District of California (Appendix II) is reported in *Shoultz v. McNamara*, 282 F.Supp. 315 (N.D. Cal. 1968).

JURISDICTION

Petitioner, under the terms of Federal Rule of Civil Procedure 65 and under the authority of *Green v. McElroy*, 360 U.S. 474 (1959), sought, and received, an order from the United States District Court for the Northern District of California permanently enjoining respondents from suspending petitioner's security clearance pursuant to V.B. of Department of Defense Directive 5220.6, effective January 6, 1967. Respondents, pursuant to 28 U.S.C. Section 1291, appealed that judgment to the United States Court of Appeals for the Ninth Circuit which reversed the District Court decision. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether Section V.B. of Department of Defense Directive 5220.6 which permits an indefinite (and effectively permanent) suspension of an individual's security clearance, thereby nullifying employment opportunity, without any statement of charges or other specific notice, without any opportunity to answer specific facts alleged to jeopardize an individual's security clearance, without any confrontation

or cross-examination, and without any factual basis given as the reason for suspension, is violative of the right of due process of law protected by the Fifth Amendment to the United States Constitution?

2. Whether Section V.B. of Department of Defense Directive 5220.6 which permits an indefinite (and effectively permanent) suspension of an individual's security clearance, thereby nullifying employment opportunity, without any statement of charges or other specific notice, without any opportunity to answer specific facts alleged to jeopardize an individual's security clearance, without any confrontation or cross-examination, and without any factual basis given as the reason for suspension, has been specifically authorized by Congress or the President?

3. Whether Section V.B. of Department of Defense Directive 5220.6 which permits an indefinite (and effectively permanent) suspension of an individual's security clearance, thereby nullifying employment opportunity, without any statement of charges or other specific notice, without any opportunity to answer specific facts alleged to jeopardize an individual's security clearance, without any confrontation of cross-examination, and without any factual basis given as the reason for suspension, is invalid because there is no way to test relevancy except on pain of forfeiture?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment, Due Process Clause:

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Section V.B. of Department of Defense Directive 5220.6, effective January 6, 1967:

"In the course of an investigation, interrogation, examination, or hearing, the applicant may be requested to answer relevant questions, or to authorize others to release relevant information about himself. The applicant is expected to give full, frank, and truthful answers to such questions, and to authorize others to furnish relevant information. The applicant may elect on constitutional or other grounds not to comply. However, such a wilful failure or refusal to furnish or to authorize the furnishting of relevant and material information may prevent the Department of Defense from reaching the affirmative finding required by reference (a) in which event any security clearance then in effect shall be suspended by the Assistant Srcretary of Defense (Administration), or his designee, and the further processing of his case discontinued."

STATEMENT OF CASE

Petitioner has been an employee of the Lockheed Aircraft Corporation and its subsidiary, Lockheed Missiles and Space Company, since 1960. Since 1956 petitioner has, with a brief exception not pertinent to the present litigation, held a "secret" security clearance issued under the authority of respondents in their capacity as head of the Department of Defense of the United States of America.

Lockheed Aircraft Corporation and all its subsidiary operations engage in contracts with the United States of America which require a large number of Lockheed employees to have access to classified information. Access to such classified information is permitted to employees of Lockheed only if they have a security clearance issued under the authority of the Secretary of Defense. (R. 1-2, 17.)

In June of 1966 officials of Lockheed asked petitioner to participate in an "interview" concerning his security clearance with persons unknown to him regarding subject matter unknown to him. Petitioner declined to participate in the interview and brought the matter to the attention of the American Civil Liberties Union.

On November 30, 1966, counsel for the Industrial Clearance Security Review office telephonically contacted petitioner's counsel, Ernest Besig, of the American Civil Liberties Union, to arrange an "interview" about petitioner's security clearance. Mr. Besig was informed by counsel for the Industrial Security Clearance Review office that pertinent regulations concerning investigations and examinations were being revised. It was agreed that no "interview" would occur until the new regulations were available.

On December 7, 1966, Department of Defense Directive Number 5220.6 was repromulgated, effective January 6, 1967. This Directive, dealing with the subject of "Industrial Personnel Security Clearance Program" contained a new regulation, Section V.B. (R. 3, 18.)

On February 3, 1967, counsel for petitioner received a letter from William J. Scanlon, an agent of respondents, informing him that "The Screening Board of this office has determined that a personal interview with Mr. Shoultz would be of assistance to it in reaching a final determination in his case," noting that "In particular, the Board desires that he be questioned in order to determine the extent of his participation in Cuban affairs," and scheduling the interview for February 15, 1967, (R. 7.)

On February 7, 1967, Mr. Besig informed Mr. Scanlon that petitioner would not be present at the February 15 interview because Mr. Scanlon's letter assumed that petitioner was an applicant for a security clearance whereas petitioner possessed a valid security clearance. (R. 3, 18.)

On March 14, 1967, Solis Horowitz, Assistant Secretary of Defense, in a letter to Mr. Besig, stated that: "While it is true that Mr. Shoultz currently possesses a security clearance of SECRET, the Screening Board has some new information that might affect your client's continued eligibility for a clearance," and that the Screening Board was going to "use this information to re-examine the status" of petitioner's clearance. The letter went on to state that an interview would be scheduled for petitioner, that it would be conducted according to the procedures of Section V.B., and that if "Mr. Shoultz refuses to appear at the interview or refuses to answer questions relevant to his continued eligibility for security clearance, his existing clearance will be suspended and fur-

ther processing of his call will be discontinued." (R. 9-10.)

The "interview" was scheduled for May 5, 1967, and, by mutual agreement, was postponed until June 30, 1967. (R. 18.)

On June 28, 1967, petitioner moved, in the District Court, for a temporary restraining order prohibiting the interview scheduled for June 30, 1967. (R. 1-6.) The motion was denied without prejudice by the Honorable Alfonso J. Zirpoli as premature and as not accompanied by an adequate showing of irreparable injury.

On June 30, 1967, petitioner appeared for the "interview" and was informed that its purpose was to "assist the Screening Board in reaching a decision in the matter of your continued access authorization to classified defense information." Petitioner stated his name, address and employer in response to questions propounded by the Department Counsel who was conducting the interview. On the advice of counsel, he declined to answer further questions on the grounds that they were irrelevant, incompetent and immaterial. No impartial hearing officer was present to make rulings on these objections. After each objection, the Department Counsel simply proceeded to the next question. (R. 36.)

By letter dated October 13, 1967, petitioner was informed by the Department of Defense:

> "Therefore, in accordance with the provisions of Section V.B. of the Directive, any clearance Mr. Shoultz now has for access to classified informa-

tion released to industry subject to the regulations of the Department of Defense is herewith suspended effective immediately." (R. 42.)

On October 14, 1967, petitioner was informed by agents of Lockheed Aircraft that his clearance had been suspended and that, solely because of the suspension of his clearance, he could no longer be employed by Lockheed but would be placed on "prolonged leave of absence" without pay until such time as his security clearance status was settled. (R. 37-38.)

Petitioner then brought this suit. A temporary restraining order was issued on November 17, 1967, enjoining respondents from continuing their suspension of petitioner's security clearance. (R. 60.) A permanent injunction was entered on February 9, 1968 (R. 173-174), the Court holding that "Section V.B. is invalid as not being authorized." (R. 171.) The United States Court of Appeals for the Ninth Circuit reversed that decision on June 27, 1969, and subsequently stayed issuance of mandate pending this Court's consideration of this petition.

REASONS FOR GRANTING THE WRIT

Petitioner, if the opinion of the Court of Appeals stands, will lose his security clearance, and thus his employment[1] notwithstanding the fact that he has

[1]Before the United States District Court entered its judgment enjoining the Department of Defense from continuing its suspension of petitioner's security clearance, petitioner's employer, solely

never received a hearing with the sort of guarantees set forth in this Court's opinion in *Greene v. McElroy, supra,* and notwithstanding the fact that neither the President nor Congress has specifically authorized the suspension of a security clearance without a hearing containing such guarantees. The consequences for petitioner are immense but, more importantly, the effect the decision below will have on all persons holding security clearances will be disastrous. All will be subject to a V.B. hearing in which they need not be apprised of the charges against them; in which they will be given no opportunity to confront their accusers; and in which they will have no right of cross-examination. If they decline, on any grounds whatsoever, to answer questions propounded at these inquisitions their security clearance will be suspended, the "processing" of their case will be discontinued and they will have no review of their case. Moreover, this Court's opinion in *Greene v. McElroy, supra,* will, for all practical purposes, become a nullity, and a device to deprive all license-holders and public employees of their due process rights will proliferate.

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1. SECTION V.B. VIOLATES THE DUE PROCESS GUARANTEE OF THE FIFTH AMENDMENT.

Section V.B. will be searched in vain for a hint of due process guarantees. It contains no requirement of written specification of charges; no opportunity,

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because of the suspenson of the clearance, placed petitioner on an indefinite leave of absence without pay. (R. 37-38). Petitioner presently holds his clearance by virtue of a Court of Appeals order staying issuance of mandate pending disposition of this petition.

consequently, to reply to such charges in writing; no opportunity to confront one's accusers; no right of cross-examination; no notice as to the burden of proof; no review of the proceedings.[2]

The Court of Appeals had no real quarrel with this description of V.B. but, relying on this Court's decision in *Hannah v. Larche,* 363 U.S. 420 (1960), found the due process guarantees unnecessary. That conclusion ignores the distinction between *Hannah* and *Greene.* Like the *Greene* investigation and unlike the *Hannah* investigation, the V.B. investigation does adjudicate and impose sanctions, the V.B. investigation does make determinations depriving persons of property, the V.B. investigation does, in short, result in affirmative action which will affect an individual's legal rights. See *Hannah v. Larche, supra,* 363 U.S. at 441 and *Jenkins v. McKeithen,* ..... U.S. ....., 23 L.Ed.2d 404, 419 (1969). Nor are adverse consequences flowing from a V.B. determination "purely conjectural" or "collateral," they flow, and in petitioner's case did flow, directly from the

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[2]The District Court in its opinion in this case summarized the provisions of V.B. as follows:

> ". . . Section V.B. permits an indefinite, if not effectively permanent, suspension of an individual's security clearance, thereby nullifying employment opportunity, without any opportunity to answer specific facts alleged to jeopardize an individual's security clearance, without any confrontation or cross-examination, and without any factual basis given as the reason for the suspension." (Appendix II, p. xxvi).

The Court of Appeals felt it had discovered a notice as to the burden of proof in V.B.'s requirement that the clearance holder answer all questions. (Appendix I, p. viii). That notice might charitably be described as notice as to the burden of going forward but cannot be considered notice as to burden of proof.

investigator's decision. See *Hannah v. Larche, supra,* 363 U.S. at 443. The loss of his security clearance was a direct sanction imposed on petitioner, and it was, to say the least, "substantial." *Jenkins v. McKeithen, supra,* 23 L.Ed.2d at 418.

In *Hannah* this Court explained the difference between the general investigations conducted by the Civil Rights Commission and the accusatory proceeding conducted by a Clearance Board:

> "The various Security Clearance Boards involved in Greene were not conducting an investigation; they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment. By contrast, the Civil Rights Commission does not make any binding orders or issue 'clearances' or licenses having legal effect. Rather, it investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action de novo."
>
> (363 U.S. at 452)

Petitioner lost his security clearance because of the V.B. hearing. Labeling the hearing an "investigation" cannot obscure the fact that the hearing was to determine whether petitioner "could have a security clearance—a license in a real sense."

But, the Government successfully argued below, petitioner is not entitled to due process guarantees at the "investigatory hearing" because, if he will submit to a hearing without due process guarantees, he will then be afforded a hearing that conforms to *Greene*

standards. That argument is a curious one but not entirely novel.

In *Ex parte Sullivan,* 107 F.Supp. 514 (D.C. Utah, 1952) two criminal defendants had been examined by law enforcement officers in secret without the presence of counsel and had been tricked into making incriminatory statements. The District Judge observed:

> "[U]nquestionably Petitioners were entitled to have effective counsel *at the trial.* The question here is how they ever could have had effective counsel at the trial, no matter how skilled, in view of what went on before trial. They were denied effective counsel at the trial itself because of what went on before trial while the defendants were without counsel, and absolutely under the control of the prosecution. . . . One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial.'" (Emphasis in Original)[3]

Obviously the right to a due process hearing is meaningless if one must first submit to a hearing without due process guarantees and may be denied the second hearing if he elects, on any grounds whatever, not to answer a question.

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[3]*Ex parte Sullivan* was cited with approval by this Court in *Escobedo v. Illinois,* 378 U.S. 478, 487 (1964). The notion that a person must submit to a procedurally unfair hearing as a condition to receiving a hearing with some procedural protections has been accepted in legal systems less concerned with the niceties of due process. See Feifer, *Justice in Moscow,* 86 (1964).

This Court has never endorsed the theory that a denial of due process may be countenanced because one may, at some later proceeding, receive due process. In *Jenkins v. McKeithen, supra,* for example, the procedures of the Louisiana Labor-Management Commission of Inquiry were found inconsistent with due process even though the ultimate sanction of its investigation, criminal penalties, could only be imposed after a criminal trial with full due process guarantees. In contrast, the V.B. hearing can result in the imposition of the ultimate sanction, suspension of security clearance, without any other preceeding taking place. The Louisiana hearing, it was held, had to provide some of the trappings of due process because, "It is no answer that the Commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged actions will have a substantial impact on him." *Id.,* 23 L.Ed.2d at 418. In contrast, the V.B. "preliminary hearing" has imposed a direct sanction on petitioner.

In *Bantam Books v. Sullivan,* 372 U.S. 58 (1963) this Court condemned the procedures of the Rhode Island Commission to Encourage Morality in Youth, which notified distributors that certain designated books or magazines distributed by them were considered "objectionable" for sale to persons under 18 years of age. The Commission itself did not have the power to impose legal sanctions; nevertheless, this Court held their procedures an unconstitutional prior restraint. It was no answer that, before the ultimate

sanction could be imposed, the distributors were entitled to a hearing with full due process guarantees.

The reason that the "ancillary" procedures of *Jenkins* and *Bantam* were struck down is that the guarantee of due process of law is not simply an abstraction. Due process guarantees are not rituals to be performed by government as an anti-climax to investigations into the actions and thoughts of citizens. It is the guarantee of due process, the guarantee that one will not be required to answer dragnet-questions asked without any foundation for an inquiry into unlawful behavior, Cf. *Gibson v. Florida Legislative Investigating Committee,* 372 U.S. 539, 557 (1963), that is the peripheral protection of First Amendment and other freedoms guaranteed by the United States Constitution.[4] And First Amendment questions inevitably lurk in every "security" investigation. See, e.g., *Schneider v. Smith,* 390 U.S. 17 (1968); *Greene v. McElroy, supra* (Petitioner, at his V.B. hearing, was asked such questions as whether he had ever listened to Radio Havana and whether he had "any type of contact" with the Fair Play for Cuba Committee).

Security investigations, since they are capable, and indeed have a tendency, to encroach upon the consti-

[4]The United States Court of Appeals declined to consider any First Amendment ramifications of V.B., noting that "Shoultz rests his argument on the Fifth Amendment, not the First." (Appendix I, p. vii). Petitioner, true enough, rests his claim of right in refusing to answer questions on a due process objection to the entire procedure rather than on a First Amendment objection to specific questions. But petitioner's over-all claim is that he cannot properly protect his First Amendment or other rights in a hearing devoid of due process guarantees.

tutional liberties of individuals, must conform to due process procedures. See, *Sweezey v. New Hampshire,* 354 U.S. 234, 245 (1957).

Why should a questionnaire, which stands as a bar to a license if one refuses to answer some of its questions, raise serious constitutional issues *Schneider v. Smith, supra,* but a "hearing", which will result in the revocation of a license if one refuses to answer any questions, raise no constitutional issues? Indeed there is more justification for the former than the latter. At least the questionnaire establishes nothing more than a general curiosity that may be out of bounds. Since a questionnaire, such as that involved in *Schneider,* is presented to all applicants, there is no suggestion that there are any adverse charges against the individual. Where a revocation hearing is involved, however, the government, unless it is acting in a totally arbitrary fashion, must have some reason for convening the hearing. There must be some charges, whether they be vague and groundless or not, that have inspired the hearing. That is why a revocation hearing is different from a license application, for a hearing ". . . embraces . . . a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States,* 304 U.S. 1, 18 (1938).[5]

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[5]License revocation, even when designed to protect the public, is, after all, punishment imposed on the licensee and "He is accordingly entitled to procedural due process, which includes fair notice of the charge." *In re Ruffalo,* 390 U.S. 544, 550 (1968) "These are adversary proceedings of a quasi-criminal nature." *Id.* at 551. It is impossible to have an adversary hear-

A "preliminary" hearing which contains no due process guarantees and results in the revocation of a security clearance whenever one declines to answer a question, of whatever sort and inspired by unknown charges, is the most objectionable means imaginable for stifling fundamental liberties. The Court of Appeals concluded that this sort of *in terrorem* device was justifiable because of the government's undeniably great interest in security (Appendix I, pp. xiii-xiv). But *United States v. Robel,* 389 U.S. 258, 263-264 (1967) teaches that even that greatest of all interests "cannot be invoked as a talismanic incantation to support any exercise of power . . . which can be brought within its ambit." For "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). The government can, as *Greene* establishes, pursue its legitimate objective without denying petitioner all of the guarantees of due process. It should also be emphasized that if at any time since June of 1966 (when the government first exhibited a desire to question petitioner) petitioner in fact posed some danger to the

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ing in which one is not apprised of the charges and in which one must answer all questions on pain of losing his license and receiving no further hearing. The Court of Appeals, in its decision, ignored the accusatory nature of a revocation hearing, as distinguished from a license application, and concluded that the clearance possessor and clearance applicant were on the same footing (Appendix I, pp. xii-xiii). The infirmity of this theory is easily demonstrated by standing it on its head. Must a security clearance be granted to every applicant, once he has answered the initial questions, unless he is afforded a *Greene* hearing?

national security, his clearance could have been suspended under the authority of Section 9 of Executive Order 10865 which provides for the denial of a security clearance without the customary procedural protections "only when the head of a department determines that the procedures prescribed in Sections 3, 4, and 5 cannot be invoked consistently with the national security." The reason the Section 9 procedures have never been adopted, evidently, is that there is insufficient evidence to frame a statement of charges against petitioner.

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2. SECTION V.B. HAS BEEN AUTHORIZED NEITHER BY THE PRESIDENT NOR BY THE CONGRESS.

The District Court was of the opinion that the decision of this Court in *Greene v. McElroy,* 360 U.S. 474 (1959), controls this litigation.

The issue in *Greene* was identical to the issue now before this Court, that is:

> "[W]hether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." *Id.* at 493.

This Court decided that there was no authorization because:

> "Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, *specifically* has decided that the imposed procedures are necessary and warranted and has authorized their use [citations]. Such decisions . . . must be made *explicitly* not only to assure that the individuals are not deprived of cherished rights under procedures not actually authorized [citation] but also because *explicit* action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without *explicit* action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Id.* at 507. (Emphasis added.)

And see, *Schneider v. Smith,* 390 U.S. 17 (1968); *Garrott v. United States,* 340 F.2d 615 (Ct. Cl. 1965); *Davis v. Stohr,* 293 F.2d 860 (D.C. Cir. 1961).

Congress has not enacted an industrial security clearance program. The District Court found no specific authorization for Section V.B. in any Executive Order issued by the President. The Court of Appeals found it unnecessary to determine whether such authorization existed and the government directed the Court's attention to none. The government

did refer to Executive Order 10501, 18 Fed.Reg. 7049, but, as the District Court found, 10501 "does not specifically authorize the procedure sanctioned by Section V.B." (Appendix II, p. xxviii). The government apparently asked that court to conclude that 10501 authorizes V.B. by *inference*. Inferences are not *explicit;* an inference of an authorization is not a *specific* authorization. The government asked the lower courts to do what this Court refused to do in *Greene*. *Greene v. McElroy, supra* at 495-496. Instead this Court reaffirmed its "concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Id.* at 508.

The government also sought, curiously enough, to infer authorization for V.B. from Executive Order 10865. 10865 was issued in 1960 by President Eisenhower.[6] Entitled "Safeguarding Classified Information Within Industry," it was a direct response to the *Greene* decision and promulgated in the spirit of Executive support for the due process guarantees discussed at such great length in *Greene*. The Presi-

[6]Department of Defense Directive 5220.6, dealing with the issuance and termination of industrial security clearances and promulgated under the authority of Executive Orders 10865 and 10909, has been in existence since July 28, 1960. Section V.B., however, did not appear in the original directive; it was added when D.O.D. Directive 5220.6 was repromulgated on December 7, 1966. It is a totally new procedure never before tested in a court of law and relying on no new authorization by the President.

dent made his intent manifest in the fourth paragraph of 10865, which provides:

> "Whereas I find that those provisions and procedures recognize the interest of individuals affected thereby and provide maximum safeguards to protect such interests;"

The President, far from attempting to evade the safeguards of a hearing, specification of charges, confrontation and cross-examination adumbrated in *Greene,* reemphasized his commitment to "maximum safeguards" in the specific provisions of Executive Order 10865. Section 3 provides that authorization may not be finally denied or revoked unless the following procedural guarantees are met:

(1) Comprehensive written statement of reasons.

(2) Opportunity to reply in writing.

(3) Personal appearance after written reply.

. . . .

(6) Cross-examination.

(7) Written and specific notice of decision.

As the District Court observed, "The section [Section 3] clearly does not authoribze the procedure of Section V.B. and the Court feels that by inference Section V.B. is inconsistent with this section of the Executive Order" (App. II, pp. xxviii-xxix).

What this Court in *Greene,* in response to the government's contention that Presidential authorization could be inferred from Executive Orders 10290

and 10501 for an industrial clearance program under which affected persons might lose their livelihoods on the basis of proceedings that contained no due process protections, is equally applicable to the government's identical claim on behalf of Executive Orders 10865 and 10501:

> "Clearly, neither of these orders empowers any executive agency to fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest."
>
> *Greene v. McElroy, supra,* at 502.

Greene v. McElroy, supra, stands for the proposition that a security clearance revocation procedure which does not apprise the accused of the adverse evidence that the government may have and does not permit the accused effectually to contest that evidence cannot stand unless it is explicitly authorized by the President or Congress. The District Court correctly determined that Section V.B., a procedure indistinguishable from that reprobated in *Greene,* has not been authorized.

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3. THE PROCEDURES OF SECTION V.B. ARE INVALID BECAUSE THEY PROVIDE NO WAY TO TEST RELEVANCY EXCEPT ON PAIN OF FORFEITURE.

Section V.B. provides that the Screening Board may delegate to an investigator the duty to ask cer-

tain questions of a holder of a security clearance. If the holder refuses to answer one or more of the questions *and if the questions are deemed relevant* the clearance is suspended indefinitely. There is no hearing officer to rule on the relevancy of questions when an objection is made. Thus, the holder of a clearance who refuses to answer questions does so at his peril and if they are later deemed to be "relevant" he loses his clearance. The determination of relevancy is done without argument or hearing. This exact situation was examined by this Court in cases involving the pertinency of questions asked at legislative investigations. The question was examined in detail in the leading case of *Watkins v. United States,* 354 U.S. 178 (1957). The rule is there established that a witness may not be punished for contempt of Congress where he objects to a question on the basis of its lack of pertinency and the investigating body does not explain to him in detail the exact manner in which the question is pertinent. In *Watkins,* this Court, in discussing the pertinency of the questions asked in that investigation, stated (354 U.S. at 214, 215):

> "Having exhausted the several possible indicia of the 'question under inquiry,' we remain unenlightened as to the subject to which the questions asked petitioner were pertinent. Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance. Unless the subject matter has been made to appear with undis-

> putable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it."

The transcript of petitioner's V.B. hearing was entered as an exhibit in the District Court (R. 48-49). It reveals that there was in fact no hearing officer present at the "interview" to rule on the objections to the relevancy of particular questions. The hearing occurred on June 30, 1967, but it was not until October 13, 1967, that petitioner learned that the questions he failed to answer were deemed relevant within the meaning of Section V.B. (R. 57-58) and even then he did not learn which of the questions he failed to answer was deemed relevant and which was not. (For example, was petitioner's failure to answer the question concerning his marital status [Transcript p. 15] held against him?)

The fundamental unfairness of "dragnet" procedures condemned in *Watkins* and *Gibson v. Florida Legislative Investigating Committee, supra,* is underscored by the instant case in which the subject of an "interview" is coerced into answering all questions asked him since he cannot know which of them will subsequently, on the cold record and without argument, be found relevant.

CONCLUSION

For the aforementioned reasons petitioner respectfully submits that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
August 22, 1969.

Respectfully submitted,

PAUL N. HALVONIK,
MARSHALL W. KRAUSE,
American Civil Liberties Union
of Northern California,
Attorneys for Petitioner.

(Appendices Follow)

Appendix I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARK CLIFFORD, Secretary of Defense, et al.,
Appellants,

vs.

DEXTER C. SHOULTZ,
Appellee.

No. 23,005

[June 27, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

ELY, Circuit Judge:

Lockheed Missiles and Space Company employed Shoultz, in 1960, to perform work requiring a "Secret" security clearance. His duties, since 1966, involved computer programming. In June of 1966, Lockheed requested him to participate in an interview concerning his security clearance. He refused. Subsequently, the Screening Board of the Office of the Assistant Secretary of Defense (Administration) informed Shoultz that it possessed new information which might affect his continued eligibility for a security clearance and that a personal interview would assist the Board in the performance of its responsibility to determine whether his continued access to secret information was consistent with the national interest. The Board advised Shoultz's counsel that Shoultz would be asked "questions relating to matters germane to his eligibility for a clearance" and that "[i]n particular, the Board desires that he be questioned in order to determine the extent of his participation in Cuban affairs." The Board also announced that Shoultz would be allowed

to make a statement in his own behalf, to be represented by counsel, and to refuse to answer any questions on constitutional or other grounds. The Board warned, however, that the procedures set forth in Department of Defense Directive (DD) 5220.6 § V (B)[1] controlled and that, accordingly, Shoultz's refusal to answer could result in the suspension of his security clearance and the discontinuation of further proceedings.

Shoultz appeared for his interview on June 30, 1967. He answered the initial questions asking his name, employer, and home address, but his counsel objected to all other questions on the ground that they were "incompetent, irrelevant, and immaterial." The unanswered questions included the following:

"Now, Mr. Shoultz, have you ever visited the country of Cuba?"

"Mr. Shoultz, have you ever had any type of contact with any person or persons whom you knew or believed to be representatives of the Castro Government of Cuba?"

"Mr. Shoultz, have you ever had any type of contact with any person or persons whom you knew or believed to be a representative or employee of Radio Havana?"

"Mr. Shoultz, have you ever had any type of contact with any person or persons whom you knew or believed to be a member of the Communist Party in Cuba?"

"Mr. Shoultz, have you ever had any type of contact with the organization known as the Fair Play for Cuba Committee"

"Mr. Shoultz, have you ever had any type of communications with individuals working in or any department of Radio Havana?"

"Mr. Shoultz, have you ever received any messages from persons whom you know or believed to be representatives of the Castro Cuban Government"

"Mr. Shoultz, have you ever listened to Radio Havana broadcasts?"

As a result of Shoultz's refusal to answer the questions addressed to him during the interview, the Board notified him that it had been deprived of essential information for the determination of his continued eligibility for a security clearance and that his clearance was suspended until such time as he might make application to the

[1]Section V(B) is reprinted in the text of the opinion, *infra*.

Office of the Assistant Secretary of Defense and receive a favorable determination. Lockheed then placed Shoultz on a "prolonged leave of absence" until the matter of his security clearance could be settled, and Shoultz instituted suit in the Court below.

The District Court, considering that it had "exposed serious constitutional problems," enjoined the Government from suspending Shoultz's security clearance under section V (B) of the Defense Directive, DD 5220.6. *Shoultz v. McNamara*, 282 F. Supp. 315 (N.D. Cal. 1968). Relying heavily on *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed. 2d 1377, 79 Sup. Ct. 1400 (1959), the court, while avoiding decision on the constitutional issues, struck down the Directive's procedure for its lack of specific authorization by the President or Congress. The Government has appealed, invoking our jurisdiction under 28 U.S.C. § 1291.

We have concluded that the procedures contemplated by DD 5220.6, including § V (B) insofar as this regulation is considered in our opinion below, are consistent with due process of law and are within the authority delegated by the President and the Secretary of Defense. Accordingly, we reverse.

DELEGATION OF AUTHORITY

At the outset we have reviewed the teaching of the Supreme Court in *Greene v. McElroy, supra*, wherein the Government attempted to revoke the security clearance of an aeronautical engineer whose industrial employment depended on the clearance. The Government Boards which were concerned with that case based their action on certain confidential reports which the employee at no time had an opportunity to examine. Moreover, the procedures did not allow the employee any opportunity for cross-examination of adverse witnesses. 360 U.S. at 479-80, 485-90. The Court held that those particular industrial security clearance procedures were too much opposed to our traditional notions of the rights of confrontation and cross-examination. Finding no Congressional or Presidential authorization for the unusual procedures, the Court avoided the necessity of reaching constitutional issues. We read, at 506-07:

> "We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to

follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use."

Accommodating to the Supreme Court's decision in *Greene*, President Eisenhower, on February 24, 1960, issued Executive Order 10,865, 25 Fed. Reg. 1583, entitled *Safeguarding Classified Information Within Industry*. *See* Exec. Order No. 10,865, *as amended*, 3 C.F.R. 512 (1968). This Order precludes the final denial or revocation of an individual's security clearance until he has been afforded the following procedural safeguards: (1) a written statement of the reasons why access to classified information may be denied; (2) opportunity to reply in writing; (3) opportunity for a hearing after the filing of a written reply to the statement of reasons; (4) reasonable time to prepare for the hearing; (5) opportunity to be represented by counsel; (6) opportunity to cross-examine persons on matters not relating to the characterization of any organization or individual other than the applicant;[2] (7) written notice of the final decision concerning the allegations contained in the statement of reasons. 3 C.F.R. at 514, section 3. An exception to these procedures is provided in the Order's section 9, but the exception applies only in the event that the Secretary of Defense or the head of another executive department personally finds, without delegating his authority, that the procedures "cannot be invoked consistently with the national security and such determination shall be conclusive."

Section 2 of Executive Order 10,865 requires that an affirmative finding be made in the determination that access to classified information shall be authorized:

> "An authorization for access to classified information may be granted by the head of a department or his designee, including but not limited to those officials named in section 8 of this order, to an individual, hereinafter termed an 'applicant', for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so."

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[2]Section 4 of Executive Order 10,865 provides for the limited number of situations wherein cross-examination must be restricted because of the demands of national security. DD 5220.6 § VIII (D)(5) contains similar restrictions. We have not intended to express, and we do not express, any opinion as to their validity.

This section, by reference to section 8, expressly authorizes the Secretary of Defense to delegate to the Deputy or Assistant Secretary of Defense the responsibility for insuring that access to classified information is authorized only upon an affirmative finding of clear consistency with the national interest. Section 1 (a) delegates the authority to executive department heads, including the Secretary of Defense, "by regulations [to] prescribe such specific requirements, restrictions, and other safeguards to protect (1) releases of classified information to or within United States industry . . . ."

Pursuant to Executive Order 10,865, the Department of Defense promulgated DD 5220.6 on December 7, 1966. This Directive delegates to the Assistant Secretary of Defense (Administration) the responsibility for the control of access by industrial personnel to classiffed information and provides for the designation by him of a Screening Board to consider initially all cases involving the denial or revocation of an industrial security clearance. Section VIII (A)(2) of the Directive authorizes the Screening Board to investigate, to direct written interrogatories, and to conduct interviews with any individual, designated an "applicant," whose security clearance is being considered. The section also authorizes the Board to recommend to the Assistant Secretary of Defense (Administration) that the applicant's clearance be suspended pending the completion of proceedings. Section VIII (A)(5) directs the Board to issue a written notice if it determines that a security clearance is "clearly consistent with the national interest," the standard specified by Executive Order 10,865, and in such event to rescind any outstanding suspension. If, however, the Board's investigative findings do not warrant determination favorable to an applicant, the Board is required to serve a Statement of Reasons clearly outlining the further procedures and the applicant's right to counsel. DD 5220.6 § VIII (A)(6). In line with the Executive Order, the Directive, in its sections VIII (A)(7) and (8), entitles the applicant to a formal hearing if he so requests and if he replies to the Statement of Reasons. The Directive insures that this hearing, with right of appeal to an Appeal Board, is fully surrounded by the procedural safeguards which the Executive Order established to protect the interests of the applicant and which include recognition of the applicant's right to confront and cross-examine adverse witnesses. DD 5220.6 §§ VIII (B) - (F).

The Screening Board's investigative duties are an integral part of the procedures of section VIII of DD 5220.6 and are necessary to enable the Board to prepare a Statement of Reasons, required by section 3 of the Executive Order and section VIII of the Directive, or, on the other hand, to determine that an individual's security clearance is clearly consistent with the national interest, as required by section 2 of the Executive Order and section VIII of the Directive. The Directive's section V (B), the section challenged by Shoultz, contemplates that one who seeks, or seeks to retain, his security clearance shall provide relevant information concerning his eligibility to the Board as it undertakes to perform its authorized investigative duties. The section provides,

> "In the course of an investigation, interrogation, examination, or hearing, the applicant may be requested to answer relevant questions, or to authorize others to release relevant information about himself. The applicant is expected to give full, frank, and truthful answers to such questions, and to authorize others to furnish relevant information. The applicant may elect on constitutional or other grounds not to comply. However, such a wilful failure or refusal to furnish or to authorize the furnishing of relevant and material information may prevent the Department of Defense from reaching the affirmative finding requirred by [Executive Order 10,865] in which event any security clearance then in effect shall be suspended by the Assistant Secretary of Defense (Administration), or his designee, and the further processing of his case discontinued."

In our opinion, this regulation in aid of the Board's performance of its delegated investigative duties is within the scope of authority granted by the President and is reasonably necessary in order that the Board and the Assistant Secretary of Defense may perform their duties as imposed by Executive Order 10,865.

Since we have determined, by reasoning contained in a subsequent portion of this opinion, that these procedures, as applied to Shoultz, present no serious and unresolved questions of constitutional law, we need not now decide whether these authorized regulations were "explicitly" and "specifically" authorized by either Congress or the President. This was the issue posed by the Supreme Court in *Greene, supra,* 360 U.S., at 507, wherein the Court did not resolve the constitutional issues, even though

the procedures there attacked were far more questionable and possibly unfair than those available to Shoultz and under consideration here.

DUE PROCESS OF LAW[3]

The gravamen of Shoultz's constitutional argument is that he should not be required to assist in the Screening Board's investigation of his continued eligibility for a security clearance. If he had elected to answer the questions directed to him, final revocation of his clearance could not have occurred until the conclusion of an adjudicatory administrative hearing which would have satisfied constitutional requirements and, presumably, would have even harmonized with Shoultz's notions of fairness. At the adjudicatory hearing, Shoultz would have enjoyed his rights of confrontation and cross-examination. As required, the charges would have clearly been set forth in a Statement of Reasons, and final decision affecting his security clearance could not have been reached without the guarantee of procedures not subject to chal-

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[3]Shoultz has not raised, and we do not now consider, any argument concerning a possible "chilling effect" that the Industrial Personnel Security Program might have on his freedom of association or whether, as to Shoultz, there is an overriding national interest in compelling his disclosure of his associations. *Cf., e.g., Keyishian v. Board of Regents,* 385 U.S. 589, 17 L. Ed. 2d 629, 87 Sup. Ct. 675 (1967); *NAACP v. Alabama,* 357 U.S. 449, 2 L. Ed. 2d 1488, 78 Sup. Ct. 1163 (1958). Shoultz rests his argument on the Fifth Amendment, not the First. The Government, in support of the Program, cites, *inter alia, In re Anastaplo,* 366 U.S. 82, 6 L. Ed. 2d 135, 81 Sup. Ct. 978 (1961); *Konigsberg v. State Bar,* 366 U.S. 36, 6 L. Ed. 2d 105, 81 Sup. Ct. 997 (1961); *Nelson v. County of Los Angeles,* 362 U.S. 1, 4 L. Ed. 2d 494, 80 Sup. Ct. 527 (1960); *Lerner v. Casey,* 357 U.S. 468, 2 L. Ed. 2d 1423, 78 Sup. Ct. 1311 (1958); *Beilan v. Board of Education,* 357 U.S. 399, 2 L. Ed. 2d 1414, 78 Sup. Ct. 1317 (1958); *Garner v. Board of Public Works,* 341 U.S. 716, 95 L. Ed. 1317, 71 Sup. Ct. 909 (1951); *Blumenthal v. FCC,* 318 F.2d 276 (D.C. Cir. 1963); *Borrow v. FCC,* 285 F.2d 666 (D.C. Cir. 1960); and *Cronan v. FCC,* 285 F.2d 288 (D.C. Cir. 1960). Shoultz's answer to these cases is, in his Brief at 10, the following:

> "The government does not explain why . . . [the rejection of First Amendment claims in certain of those cases] *is relevant to appellee's assertion of a Fifth Amendment right in the instant case,* but the suspicion that the government may have such an analogy in mind is buttressed by its citation to . . . [the remaining cases of those listed above]. Each of those authorities, like *Konigsberg* and *Anastaplo,* dealt not with a claim of a violation of due process of law but the assertion of a constitutional privilege when refusing to answer particular questions." (Emphasis added.)

lenge. Here, Shoultz himself throws up the bar to those proceedings.

We are thus concerned with the Screening Board's preliminary investigative procedure and with suspension of one's clearance as the sanction for his refusal to provide relevant information, rather than with an adjudicatory proceeding convened to decide the eligibility for a security clearance of one who has been willing to disclose relevant information concerning such eligibility. Thus the proceedings included in *Greene v. McElroy, supra,* stand in contrast to the procedure faced by, and open to, Shoultz. In *Greene,* the industrial employee was fully willing to relate, and did relate, his version of the issues raising doubt about the desirability of his continued access to classified information. 360 U.S. at 478-79, 487-88. The only adjudicatory hearings available to the employee in *Greene,* however, failed to provide him with any opportunity whatsoever to confront and cross-examine those making charges against him. If the procedures of DD 5220.6 had been available to the *Greene* employee, as they were to Shoultz in our case, the *Greene* employee would have received the procedural safeguards for which he contended without the need for judicial intervention.

Shoultz contends that the Screening Board interview infringed his due process rights. We read from his Brief, at 7-8, the following:

> "If this Court will imagine a hearing in which some of the guarantees of due process of law are present it will imagine everything that V. B. is not. There is no requirement of written specification of charges; no opportunity, consequently, to reply to such charges in writing; no opportunity to confront one's accusers; no right of cross-examination; no notice as to the burden of proof; no review of the proceedings."

The Screening Board did issue notice as to the burden of proof. The Board warned Shoultz that it considered that the information which it sought was relevant and germane to its determinations and that a refusal to answer could prevent the Department of Defense from reaching the affirmative finding required by Executive Order 10,865 and could result in the suspension of his clearance. Shoultz also received a copy of the regulations setting forth the procedures and the standards for making security clearance determinations.

We proceed, then, to Shoultz's allegations concerning the Screening Board's failure to provide a written specification of charges in connection with the interview, an opportunity to reply to such charges in writing, the opportunity to confront one's accusers, the right of cross-examination, and the right to a review of the proceedings. These are the same rights that *are provided* in the subsequent adjudicatory hearing required by DD 5220.6 for the final determination of the security clearances of those who have been willing to furnish relevant information during the Screening Board investigation.

In *Hannah v. Larche,* 363 U.S. 420, 4 L. Ed. 2d 1307, 80 Sup. Ct. 1502 (1960), the Supreme Court distinguished the procedural defects found in *Greene v. McElroy, supra,* and approved an investigatory proceeding before the Commission on Civil Rights.[4] There, certain voting registrars under investigation attacked the proceeding because of the lack of disclosure to them of the identity of persons submitting complaints, of the failure to provide for cross-examination, and of the failure to relate interrogatories to specific complaints. The Court observed that the Commission did not make determinations controlling one's legal rights and that its sole purpose was to make factual findings which could be subsequently used as the basis for legislative or executive action. 363 U.S. at 441. We read, at 442-43:

> "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a gen-

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[4]The Court distinguished the *Greene* case in the following language: "[O]ur decision last year in *Greene v. McElroy* lends little support to the respondents' position. The governmental action there reviewed was certainly of a judicial nature. The various Security Clearance Boards involved in *Greene* were not conducting an investigation . . . ."

363 U.S. at 452. *See generally Jenkins v. McKeithen,* 37 U.S.L.W. 4496 (U.S. Jun. 9, 1969).

eralization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.

It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate, it need not be bound by adjudicatory procedures. Yet, the respondents contend, and the court below implied, that such procedures are required since the Commission's proceedings might irreparably harm those being investigated. . . . There is nothing in the record to indicate that such will be the case. . . . However, even if such collateral consequences were to flow from the Commission's investigations, they would not be the results of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function."

Mr. Chief Justice Warren, writing for the Court, related at length, in the Opinion and in a thirty-two page Appendix, that investigatory proceedings to determine facts upon which subsequent adjudicatory proceedings might be based are traditional and that they are wide-spread throughout our legal system.[5] The

[5]Mr. Chief Justice Warren drew an analogy between investigative administrative proceedings and our traditional grand jury procedures:

"[I]t would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Un-

Chief Justice reviewed the procedure before the Federal Trade Commission as revealing of the full panoply of administrative proceedings which may result in subsequent adjudicatory action by an agency:

> "A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 CFR, 1958 Supp., § 1.34. Although the latter are frequently initiated by complaints from undisclosed informants, *id.*, §§ 1.11 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, *id.*, § 1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of 'the purpose and scope of the investigation,' *id.*, § 1.33, and while they may have the advice of counsel, 'counsel may not, as a matter of right, otherwise participate in the investigation.' *Id.*, § 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding. . . ."

363 U.S. at 446. In the Appendix, the Chief Justice added,

> "Finally, it is important to observe that the FTC, unlike the Civil Rights Commission, has the authority to commence adjudicative proceedings based upon the material obtained by means of investigative proceedings."

363 U.S. at 459.

There is no indication of any factors pertaining to the nature of the investigating agency or the subject of inquiry concerning Shoultz suggesting that the investigative procedure herein should

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doubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try."
Hannah v. Larche, supra, 363 U.S. at 448-49

be less valid than that upheld in *Hannah v. Larche, supra.* We therefore hold that the Screening Board's investigatory procedure under DD 5220.6 to make a factual determination upon which the necessity of a subsequent and fair adjudicatory proceeding depends is not violative of due process rights. We now turn to the question of whether Shoultz's failure to answer the questions directed to him was a ground upon which the suspension of his security clearance could permissibly be predicated.

In *Gardner v. Broderick,* 392 U.S. 273, 20 L. Ed. 2d 1082, 88 Sup. Ct. 1913 (1968), and in *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation,* 392 U.S. 280, 20 L. Ed. 2d 1089, 88 Sup. Ct. 1917 (1968), the Supreme Court held that it was impermissible for a public employee to be discharged for his refusal to waive his right to immunity from subsequent prosecution in light of his fifth amendment right to avoid self-incrimination. The Court stated, however, that a public employee may be discharged from his job if, without being required to waive immunity, he refuses to answer questions specifically, directly, and narrowly relating to the performance of his official duties. An employee's invoking of his constitutional privilege against self-incrimination would not, in such a case, be a bar to his dismissal from public employment. 392 U.S. at 278 and 283-84. There is no saving difference between these public employee cases and the situation wherein an industrial employee seeks to maintain, for the sake of keeping his job, his privilege of access to classified information involving matters relating to our national security.

The interest which Shoultz attempts to promote in this case is not his right to continued employment. He could have protected that right until the completion of a fair adjudicatory hearing by providing the relevant information which the Screening Board requested of him. Shoultz's interest is actually the more narrow one of his claimed right to withhold factual information concerning his continued eligibility for a security clearance from the investigating administrative board charged by the President with the protection of classified information. This interest cannot and does not outweigh the paramount concern of the Government and the public to prevent classified national defense information from falling into the hands of persons whose reliability and loyalty are not clearly established. Surely an individual seeking a security clearance for the first time could not demand that the Government

act upon his request without his supplying the relevant information required of him. Once he is granted the privilege of access, he should have no greater constitutional protection and has acquired no greater protectible interest in withholding relevant information. The obligation to furnish this information is as great, and possibly greater, after the Government has initially authorized that an individual be given access to classified material. The danger exists that the fruits of access already authorized may be misused, and the question remains whether additional classified material should be revealed. The Government's vital duty to permit access to classified information only when "clearly consistent with the national interest" (Executive Order 10,865, section 2) is a continuing duty. It is imperative that the Government shall conduct a complete investigation when an individual files his initial application for access to classified information. The Government should not thereafter be required to conduct similarly thorough investigations of industrial personnel possessing security clearances without the aid of relevant information supplied by the person most likely and easily able to supply it. A balancing of the interests of all those concerned with the industrial security program, including those already holding security clearances, heavily preponderates in favor of the reasonableness of the requirement that an individual holding a security clearance must, upon request, submit relevant information to the Screening Board in order to avoid possible suspension of his clearance.

Since the failure upon ground of constitutional privilege to answer questions directly relevant to the performance of official duties may be proper cause for dismissal from public employment, *Gardner* and *Sanitation Men, supra,* and since the refusal to answer similarly relevant questions upon ground of constitutional privilege may be cause for suspension of a security clearance upon which employment depends, Shoultz, *a fortiori,* must accept the consequences of his refusal to answer relevant questions upon the grounds that they are "incompetent, irrelevant, and immaterial."

Shoultz cannot seriously contend that the questions, quoted *supra,* concerning his relations with Cuban Communist Party and Cuban Government representatives and organizations were irrelevant. He argues, however, that an individual must guess at his peril whether, under DD 5220.6 § V (B), the questions will be "deemed relevant" and, consequently, that the administrative procedures are invalid for failure to provide a suitable procedure for

determination of the relevancy of the questions. In *Watkins v. United States*, 354 U.S. 178, 1 L. Ed. 2d 1273, 77 Sup. Ct. 1173 (1957), the Supreme Court decided that a witness may not be punished for contempt of Congress following his objection to a question on the ground of pertinency if the subject under inquiry is not undisputably clear and if the investigating committee has not explained the pertinency of the question. 354 U.S. at 214-15. The Court wrote,

> "[W]e remain unenlightened as to the subject to which the questions asked petitioner were pertinent. Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance. Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on the grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."

Id. In this case, Shoultz was not under a similar disability to decide whether to answer the Screening Board's questions. On their face, they were clearly relevant to a determination of his fitness for continued access to national defense information. The Board advised Shoultz by letter prior to the interview that it desired "to determine the extent of his participation in Cuban affairs" for the purpose of determining his eligibility for a security clearance. The copy of the pertinent regulation, DD 5220.6, furnished Shoultz's attorney, set forth in section VI the relevant criteria for determining eligibility for a security clearance. The questions asked Shoultz were directly concerned with the criteria of subsections VI (B), (D), (F), (I), (J), and (K), set forth in the margin.[6] Since the Screening Board's questions were, with

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[6] "VI. CRITERIA

The criteria for determining eligibility for a clearance shall relate, but not be limited to, the following:

• • •

B. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or with an espionage agent or other representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Govern-

"undisputable clarity," pertinent to a subject of proper inquiry, the requirements of the *Watkins* case, *supra*, were fully satisfied.[7]

Shoultz faced fair and reasonable proceedings within the Department of Defense, proceedings legally authorized by Executive Order 10,865. The rights of Shoultz were not infringed. The questions directed to him by the Screening Board were not, as his counsel asserted, "incompetent, irrelevant, and immaterial."

The injunction issued by the District Court is vacated. Upon remand the complaint will be dismissed.

Reversed.

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ment of the United States or the alteration of the form of Government of the United States by unconstitutional means.

• • •

D. Membership in, or affiliation or sympathetic association with, or participation in the activities of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

• • •

F. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

• • •

I. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.

J. Sympathetic association with a member or members, or an organization referred to in D., above. Ordinarily, this will not include chance or occasional meetings nor contacts limited to normal business or official relations.

K. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in A. through J., above. A close continuing association may be deemed to exist where the individual lives at the same premises as, frequently visits, or frequently communicates with, such person."

[7]We do not now face such a case, but if some future proceeding might contain irrelevant questions or questions of doubtful relevancy infringing upon the protectible interests of one under inquiry, and if that person failed to obtain relief through administrative appeals within the Department of Defense, nothing in this opinion would preclude him from seeking judicial review and relief.

Appendix II

Dexter C. SHOULTZ, Plaintiff,

v.

Robert S. McNAMARA, Secretary of Defense, and Does One Through Ten, Defendants.

No. 47330

United States District Court
N. D. California.

Feb. 9, 1968.

PECKHAM, District Judge.

Plaintiff, a holder of a security clearance, employed by Lockheed Missiles and Space Company of Sunnyvale, California, seeks to enjoin the defendants, Secretary of Defense Robert S. McNamara and other Defense Department officials, from suspending plaintiff's secret security clearance pursuant to the provisions of Section V. B. of Department of Defense Directive 5220.6, effective January 6, 1967.[1] Both par-

[1] "In the course of an investigation, interrogation, examination, or hearing, the applicant may be requested to answer relevant questions, or to authorize others to release relevant information about himself. The applicant is expected to give full, frank, and truthful answers to such questions, and to authorize others to furnish relevant information. The applicant may elect on constitutional or other grounds not to comply. However, such a wilful failure or refusal to furnish or to authorize the furnishing of relevant and material information may prevent the Department of Defense from reaching the affirmative finding required by referenee (a) in which event any security clearance then in effect shall be suspended by the Assistant Secretary of Defense (Administration), or his designee, and the further processing of his case discontinued." Section V. B. of Department of Defense Directive 5220.6.

ties move for summary judgment and agree that there is no dispute as to the material facts. A minute order was entered on February 2, 1968, granting plaintiff's motion and denying defendants' motion.

The facts will not be fully repeated in this memorandum; instead, the Court adopts the statement of facts filed by defendants herein, augmented by the admitted allegations of the complaint and supplement to complaint filed herein, and such facts as do not appear in this memorandum are incorporated by this reference.

Plaintiff has been employed by Lockheed Aircraft Corporation and its subsidiary, Lockheed Missiles and Space Company, since 1960. Since June of 1966, he has been employed in the capacity of a computer programmer. Since 1956, with a brief exception not material here, plaintiff has held a security clearance at the access level of "Secret".

On or about October 13, 1967, plaintiff's security clearance was "suspended" under Section V. B. of Department of Defense Directive 5220.6 (hereinafter cited as Section V. B.). Further proceedings with respect thereto were discontinued because of plaintiff's earlier refusal to answer questions which he felt were irrelevant, immaterial or incompetent, or all of these, at a Defense Department interview held on June 30, 1967, in San Francisco, California. Almost immediately thereafter, plaintiff was informed by his employer that solely because of the suspension of his clearance he could no longer be employed by Lock-

heed but would be placed on "prolonged leave of absence" without pay until such time as his clearance status was settled.

On November 16, 1967, this Court issued a Temporary Restraining Order enjoining defendants from continuing the suspension of plaintiff's security clearance under Section V. B.; and at the hearing on the application for the Restraining Order and on subsequent occasions, the parties consented to extensions of the Restraining Order until February 4, 1968.

The crux of this case is the validity of Section V. B. and the procedures contained therein under which plaintiff's security clearance was to be suspended. First, plaintiff asserts that this Section is invalid because it is not expressly authorized by Congress or the President. Secondly, plaintiff asserts that if Section V. B. is authorized, it deprives plaintiff of a security clearance without Due Process of Law.

Plaintiff relies on Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), in support of his argument that Section V. B. is invalid for lack of specific authorization. In Greene v. McElroy, supra, the Supreme Court defined the issue before it in that case as "whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional proce-

dural safeguards of confrontation and cross-examination." (Id., at 493, 79 S.Ct., at 1412).

This Court believes that the teaching of *Greene* is that an agency of the federal government cannot, without affording the traditional forms of fair procedure, take administrative action which effectively deprives an individual of his means of livelihood on loyalty or security grounds unless, at the least, Congress (or the President, if he is the source of the power) has expressly authorized the lesser procedure. See Garrott v. United States, 340 F.2d 615, 618, 169 Ct.Cl. 186 (1965).

At the outset, defendants attempt to distinguish *Greene* by asserting that the suspension here is not a final revocation because plaintiff has it within his power to reopen the proceedings at any time he chooses to answer the questions which he declined to answer at his interview. Accordingly, defendants argue that *Greene* does not require specific authorization by the President or Congress for the Department of Defense to have included in Directive 5220.6 "normally accepted administrative practices" which permit suspension of a security clearance without a hearing and related procedural rights when the suspension does not amount to a "final" revocation.

In formulating the *Greene* test, the Supreme Court stressed the effect on the individual's livelihood of the challenged administrative action. Greene v. McElroy, supra, 360 U.S. at 500, 502, 506-507, 508, 79 S.Ct. 1400; Garrott v. United States, 340 F.2d 615, 619, 169

Ct.Cl. 186 (1965). Here, it is undisputed that under Section V. B., once a security clearance has been suspended, there is no further administrative or judicial remedy to challenge the suspension. Further processing of the case is discontinued. Defendants argue that the suspension remains in effect and further processing is discontinued only for as long as plaintiff refuses to answer the propounded questions. The Court is of the opinion, however, that this remedy is illusory. In effect, it requires plaintiff to submit to procedures which he believes are unauthorized and unconstitutional, thus rendering moot his objections to the procedures, in order to obtain a hearing with the procedural safeguards of Sections 3, 4 and 5 of Executive Order 10865.[2] In these circumstances, the Court believes that this "suspension" which has entailed a discontinuance of the processing of plaintiff's clearance, has the same final effect on plaintiff's livelihood that the Supreme Court was concerned about in *Greene*. Moreover, although plaintiff's employer was informed by the defendants that the suspension of plaintiff's security clearance was not intended to prevent utilization of plaintiff upon any nonclassified work that may be available to plaintiff, defendants admit that plaintiff was informed by authorized agents of Lockheed that solely because of the suspen-

[2]Executive Order 10865 (25 Fed.Reg. 1583), entitled "Safeguarding Classified Information Within Industry", sets up comprehensive procedures to provide the "maximum possible safeguards" to protect the interests of a holder of a security clearance. It was issued in 1960 by President Eisenhower after Greene v. McElroy. It will be discussed in more detail elsewhere in this memorandum.

sion of his clearance he could no longer be employed by Lockheed and that he would be placed on "prolonged leave of absence" without pay until such time as his clearance status was settled. In light of these facts, the Court feels that plaintiff has suffered a serious deprivation of his "right to hold specific private employment and to follow a chosen profession * * * [which come] * * * within the 'liberty' and 'property' concepts of the Fifth Amendment." Greene v. McElroy, supra, 360 U.S. 474, at 492, 79 S.Ct. 1400, at 1411. This Court is of the opinion that to hold otherwise would be honoring unduly the semantic difference between "final revocation" and "suspension", and would be disregarding the effect on plaintiff's livelihood so strongly emphasized in the *Greene* case.

The Court must next inquire whether the governmental action that was taken here deprived plaintiff of traditional forms of fair procedure which are associated with procedural Due Process. The salient facts can be briefly summarized. Plaintiff was notified that "the Screening Board [of the Department of Defense] has some *new information* that might affect * * * [his] * * * continued eligibility for a clearance", and that the Screening Board was going to "use this information to re-examine the status" of plaintiff's clearance.[3] It was indicated to plaintiff that this new information had been "developed by the

[3]Letter to plaintiff's counsel dated March 14, 1967, from Solis Horwitz, Assistant Secretary of Defense (Administration) Exhibit B to the Complaint).

investigation conducted in his case".[4] Plaintiff was requested to attend an interview at which he would be questioned about "matters germane to his [continued] eligibility for a security clearance." Plaintiff was also informed that, "[i]n particular, the Board desires that he be questioned in order to determine the extent of his participation in Cuban affairs."[5] No further notice of the purpose and scope of the inquiry was given to plaintiff, nor was he apprised of the nature of the "new information" possessed by the Screening Board which had prompted the re-examination of his security clearance. Plaintiff was informed that he could be represented by counsel at the interview and that he would be afforded an opportunity to make a statement in his own behalf. His counsel was provided before the interview with a copy of Defense Department Directive 5220.6, including Section V. B., and plaintiff was informed that the provisions of Section V. B. would be applicable. Further, plaintiff was told that if he refused "to answer questions relevant to his continued eligibility for security clearance, his existing clearance will be suspended and further processing of his case will be discontinued."

At the outset of the interview on June 30, 1967, plaintiff stated his name, address and employer in

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[4]Letter to plaintiff's counsel dated April 14, 1967, from James E. Stauffer, Department Counsel (Department of Defense) (Exhibit A to Defendant's Statement of Material Facts).

[5]Letter to plaintiff's counsel dated February 1, 1967, from William Scanlon, Director, Administrative Staff (Department of Defense) (Exhibit A to Complaint).

response to questions propounded by the Department Counsel who was conducting the interview. Thereafter, he declined to answer all other questions on the grounds that they were irrelevant, incompetent or immaterial, or all of these. There was no hearing officer or other impartial person present at the interview to make rulings on these objections. After each objection, the Department Counsel proceeded to the next question.

By letter dated October 13, 1967, plaintiff was informed by the Department of Defense in pertinent part that:

> "Having reviewed the transcript of that interview, the Screening Board has concluded that Mr. Shoultz's refusal to answer the questions addressed to him by Department Counsel denies the Board information it considers essential to a determination of his continued eligibility for security clearance. The conclusion by the Screening Board that the additional information is essential was based upon its evaluation of facts developed by investigation. Without that information the Board is unable to reach the affirmative finding required by Section 2 of Executive Order 10865 dated February 20, 1960, i.e., that it is clearly consistent with the national interest to continue his clearance."

Almost immediately, plaintiff was notified by his employer that he would be terminated solely because of the suspension.

The Court is of the opinion that, as in *Greene,* there are serious constitutional problems inherent in the suspension procedure as outlined above which is sanctioned by Section V. B. In Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960), the Supreme Court stated: "Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." (Id., at 442, 80 S.Ct., at 1515.) In that case, it was held that the rights to know the specific charges that are being investigated and the identity of the complainants, and the right to confrontation and cross-examination of the complainants and other witnesses were not constitutionally required at a Civil Rights Commission investigative hearing. The Court emphasized the "purely investigative nature of the Commission's proceedings" (Id., at 451, 80 S.Ct., at 1519) and distinguished between such a proceeding and one where the government agency involved is charged with making "determinations in the nature of adjudications affecting legal rights." (Ibid.) The Court stated that in contrast to this latter type of governmental action, as occurred in Greene v. McElroy, supra, "the Civil Rights Commission does not make any binding orders or issue 'clearances' or licenses having legal effect. Rather, it investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action de novo." (Id., at 452, 80 S.Ct., at 1520.)

Closely viewed, the personal interview is neither a purely investigative nor an adjudicatory hearing. Because of the direct effects it can have, it is a hybrid proceeding. The investigating officer, called the Department Counsel, is not empowered to make any determinations affecting an individual's security clearance. Yet the suspension which was ordered here was clearly more than a collateral or incidental effect of the interview. It was expressly sanctioned by Section V. B. for refusal to answer relevant questions. Plaintiff's clearance was ordered to be suspended precisely as he had been forewarned. This action of the Screening Board under Section V. B. transforms the personal interview into something more than a purely investigative hearing. This two-stage process, like the governmental action in *Greene,* "were determining whether [plaintiff] could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment." Hannah v. Larche, supra, 363 U.S. 420, at 452, 80 S.Ct. 1502, at 1520.

The lesser procedures sanctioned here by Section V. B. must be viewed in light of the drastic impact which they have on an individual's livelihood after a refusal to answer questions at a personal interview. The finality of this impact has heretofore been discussed. The only avenue available to plaintiff to reopen the proceedings is to submit to the lesser procedures provided by Section V. B. Finally, when viewing these procedures, the Court attaches significance to the fact that Defense Department Directive 5220.6 contains an alternative procedure of a State-

ment of Reasons and a full hearing which would more adequately protect plaintiff's procedural rights.[6]

Based on the foregoing analysis, the Court feels that Section V. B., in sanctioning the procedures which took place here, raises serious constitutional questions. In summation, Section V. B. permits an indefinite, if not effectively permanent, suspension of an individual's security clearance, thereby nullifying employment opportunity, without any statement of charges or other specific notice, without any opportunity to answer specific facts alleged to be jeopardizing an individual's security clearance, without any confrontation of cross-examination, and without any factual basis given as the reason for the suspension.

The Court is not dissuaded from the opinion by the defendant's argument that a suspension so long as there is a refusal to furnish relevant information is reasonable and procedurally proper. The instant case does not present the question whether the refusal on unprivileged grounds to answer questions in a properly convened hearing could serve as the basis for the type of suspension which was prescribed here. Defendants strenuously rely on Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961) and on In Re Anastaplo, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed. 2d 135 (1961). The government action involved in each of those cases occurred after the refusal to answer questions by an applicant for admission to a

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[6]Section VIII. Further, subsection 8 thereof provides for a summary procedure when the Secretary of Defense "determines personally that the provisions of this Directive cannot be invoked consistently with the national security."

state bar in the midst of a hearing fully consonant with procedural Due Process requirements. Also, it is significant that those administrative decisions were subject to judicial review.

Nor is the Court persuaded by the cases which defendants cite which stand for the proposition that an incomplete initial or renewal application entitles a governmental agency to discontinue processing the application.[7] In reaching this conclusion the Court is persuaded by the emphasis which the Supreme Court placed in *Greene* upon the right to be free from unreasonable governmental action by which "affected persons may *lose* their jobs and may be *restrained* in following their chosen professions * * *." (Greene v. McElroy, supra, 360 U.S. 474, at 493, 79 S.Ct. 1400, at 1412, 3 L.Ed.2d 1377) (emphasis added).

Having exposed the serious constitutional problems in Section V. B., this Court must next inquire whether "the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." (Id., at 507, 79 S.Ct., at 1419). Plaintiff asserts, and defendants do not contend otherwise, that Congress has never enacted an industrial security clearance program. There-

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[7]Borrow v. FCC, 109 U.S.App.D.C. 224, 285 F.2d 666 (1960), cert. denied, 364 U.S. 892, 81 S.Ct. 223, 5 L.Ed.2d 188 (1960); Cronan v. FCC, 109 U.S.App.D.C. 208, 285 F.2d 288 (1960), cert. denied, 366 U.S. 904, 81 S.Ct. 1046, 6 L.Ed.2d 203 (1961); Blumenthal v. FCC, 115 U.S.App.D.C. 305, 318 F.2d 276 (1963), cert. denied, 373 U.S. 951, 83 S.Ct. 1679, 10 L.Ed.2d 706 (1963); Schneider v. Roland, 263 F.Supp. 496 (W.D.Wash.1967), rev'd on other grounds, Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799.

fore, if Section V. B. is authorized, the authorization must specifically appear in an Executive Order issued by the President.

The defendants do not point to any Executive Order as specifically authorizing the procedures of Section V. B. In their Memorandum of Points and Authorities defendants argue that the authority and responsibility for the protection of official information affecting the national security is granted and delegated by Executive Order 10501, 18 Fed.Reg. 7049, 50 U.S.C. § 401 note. That Order, however, does not specifically authorize the procedure sanctioned by Section V. B. Defendants also discuss Executive Order 10865, 25 Fed.Reg. 1583, 50 U.S.C. § 401 note, as being relevant. Section 3 of that Order provides, "[e]xcept as provided in section 9 of this order," a security clearance may not be finally denied or revoked "unless the applicant has been given the following": (1) a comprehensive and detailed written statement of reasons; (2) an opportunity to reply in writing; (3) an opportunity to appear personally at a hearing; (4) a reasonable opportunity to prepare for the appearance; (5) to be represented by counsel; (6) an opportunity to confront and cross-examine his accusers (except, as provided in Section 4, when the head of the department declares that such disclosure "would be substantially harmful to the national interest"); and (7), a written notice of final decision which contains findings as to each allegation in the statement of reasons. This section clearly does not authorize the procedure of Section V. B. and the

Court feels that by inference Section V. B. is inconsistent with this Section of the Executive Order. Section 9 provides for a revocation or denial of a security clearance under lesser procedural protection "only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security". Defendants do not contend that this section has been complied with here or that it authorizes the procedure of Section V. B. Finally, Sections 1(a) and 2, the sections of Executive Order 10865 which generally restate the authority and responsibility of the executive department heads to protect classified information and issue appropriate regulations, do not constitute the specific authorization for Section V. B. which is required by Greene v. McElroy, supra. As defendants point to no other Executive Orders which might provide the requisite authorization, this Court concludes that Section V. B. is invalid as not being authorized. This ruling makes it unnecessary for this Court to decide the other ground advanced by plaintiff in support of his motion for summary judgment.

For the foregoing reasons, plaintiff's motion for summary judgment has been granted and defendants' cross-motion for summary judgment has been denied. Defendants and each of them, their agents and subordinates are permanently enjoined from suspending plaintiff's security clearance for classified materials described in the complaint in this action under the provisions of Section V. B. of Department of Defense Directive 5220.6, dated December 7, 1966. This

Order does not prevent defendants from taking appropriate action to safeguard the national security under Section 9 of the Executive Order 10865 or any other authorized provisions of Directive 5220.6, if they be so advised.[8]

[8]It is interesting to note that plaintiff was asked to attend an interview regarding his security clearance by the Defense Department at least as early as November 30, 1966. His clearance was not ordered to be suspended until on or about October 13, 1967.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 544

DEXTER C. SHOULTZ, PETITIONER

v.

MELVIN LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is not yet reported. It is set forth as Appendix I to the Petition. The decision of the district court is reported *sub nom. Shoultz* v. *McNamara* at 282 F. Supp. 315. It is set forth as Appendix II of the Petition.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1969, and the petition for a writ of certiorari was filed on August 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

867-656—69——1

QUESTIONS PRESENTED

1. Whether it denies due process to suspend the security clearance, and the further processing of an investigation concerning clearance, of an individual who refuses to answer questions deemed relevant to that investigation and thereby prevents the investigating agency from determining whether his continued access to classified national defense information is "clearly consistent with the national interest."

2. Whether the Secretary of Defense has been delegated the authority to adopt procedures providing for such suspensions.

3. Whether the petitioner was adequately apprised of the relevance of the questions asked him to the investigation of his security clearance, and had adequate opportunity to challenge the determination of relevance.

CONSTITUTIONAL PROVISIONS, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution and Section V(B) of Department of Defense Directive 5520.6 are set forth at pp. 3–4 of the petition.

Executive Order 10865, 25 Fed. Reg. 1583, is set forth in the Appendix, *infra,* pp. 21–27.

STATEMENT

This matter arose under the Industrial Personnel Security Program administered by the Department of Defense pursuant to the provisions of Executive Order 10865, 25 Fed. Reg. 1583 (App. *infra,* pp.

21–27), and Department of Defense Directive 5220.6, dated December 7, 1966, and entitled "Personnel Access Authorization Review Regulation" (R. 99–131).

The Directive places the responsibility for the Industrial Security Program in the Assistant Secretary of Defense (Administration). He, in turn, is authorized to designate a Screening Board with initial jurisdiction over all cases involving the denial or revocation of an industrial security clearance (Directive, Sections IV(D), VII(A) and VII(E)). When a clearance question is referred to the Board, it may direct an investigation, including written interrogatories, interviews, and other examinations, of the individual concerned (Section VIII(A)(2)). It is then to make a preliminary determination whether the individual's access to classified information is "clearly consistent with the national interest"—the standard established in the Executive Order for access to classified information, E.O. 10865 § 2. All cases, whether initial applications for clearance or questions of continuing clearance, are governed by this standard (Section III(E)).

If the Screening Board determines that clearance is warranted, it issues a written notice of this determination (Section VIII(A)(4)) and no further proceedings are required. If, however, the Screening Board's determination is adverse, it serves on the individual concerned a written Statement of Reasons setting forth the grounds of that determination. If the individual wishes to contest the determination, he is entitled to a hearing before an examiner, with the right to con-

front and cross-examine witnesses against him and to present his own witnesses. Any adverse decision by the Hearing Examiner may be appealed to an Appeals Board and, in certain cases, to the appropriate agency head. (Sections VIII(A)–(F), E.O. 10865 § 3.)

In connection with the Screening Board's preliminary investigation, Section V(B) of the Directive (Pet. p. 4) provides, *inter alia,* that an applicant may be requested to answer relevant questions and is expected to give full, frank and truthful answers. If a wilful refusal to answer relevant questions prevents the Department of Defense from making the affirmative finding, required by E.O. 10865, that the individual is eligible for access to classified information, Section V(B) further provides that any clearance in effect shall be suspended and the further processing of the matter discontinued. Processing will be reinstated upon application by the individual evidencing a willingness to answer the questions.

Petitioner has been employed by his present employer, the Lockheed Missiles and Space Company, since 1960; he has been a computer programmer for that firm since 1966. Since 1956, with a brief exception not here relevant, petitioner held a "Secret" security clearance issued under the authority of the Secretary of Defense.

In 1966, Lockheed unsuccessfully sought an interview with petitioner concerning his clearance. In February (R. 7), March (R. 9–10) and April (R. 72) of 1967, the Office of the Assistant Secretary of Defense (Administration) wrote to petitioner and his

counsel stating that the Screening Board had new information which might affect petitioner's continued eligibility for a clearance; it requested his cooperation in a personal interview to assist the Board in making the preliminary determination whether his continued access to classified defense information was "clearly consistent with the national interest." He was told that the interview would be conducted by Department Counsel for the Western Field Office and that he would be "asked questions relating to matters germane to his eligibility for a security clearance. In particular, the Board desires that he be questioned in order to determine the extent of his participation in Cuban affairs" (R. 7).

Petitioner was also advised that he could make a statement in his own behalf, that he could be represented by counsel if he desired and that he could elect on constitutional or other grounds not to reply to any questions at the interview. He was warned, however, pursuant to Section V(B) of the Directive, that a failure or refusal to answer relevant questions could prevent the Department of Defense from reaching the required affirmative finding and that in that event his clearance would be suspended and further proceedings discontinued (R. 10). Petitioner was furnished a copy of the Directive which sets forth the standards and criteria for making clearance determinations and the applicable procedures (R. 72).

After some postponements at petitioner's request, the interview was scheduled for June 30, 1967. Petitioner then filed in the district court a complaint for temporary and permanent injunctive relief against

the interview, alleging that Section V(B) violated due process and was unauthorized (R. 1–6). Relief was denied on grounds of prematurity and failure to show irreparable injury (R. 35).

The interview was held as scheduled on June 30, 1967. Petitioner was represented by counsel. After he had stated his full name, home address and employer, his counsel objected to all other questions as irrelevant, immaterial and incompetent and refused answers to any further questions or any further statements. Other than abortive questions seeking to insure that petitioner was personally familiar with the provisions of the applicable laws and regulations, the totality of the questions he refused to answer was as follows:

> And how long have you been employed with this organization [Lockheed Research Laboratory]?
>
> Are you a high school graduate?
>
> Are you a college graduate, Mr. Shoultz?
>
> Are you married, Mr. Shoultz?
>
> Now, Mr. Shoultz, have you ever visited the country of Cuba?
>
> Mr. Shoultz, have you ever had any type of contact with any person or persons whom you knew or believed to be representatives or members of the Castro Government of Cuba?
>
> Mr. Shoultz, have you ever had any type of contact with any person or persons whom you knew or believed to be a representative or employee of Radio Havana?
>
> Mr. Shoultz, have you ever had any type of contact with any person or persons whom you

knew or believed to be a member of the Communist Party in Cuba?

Mr. Shoultz, have you ever had any type of contact with the organization known as the Fair Play for Cuba Committee?

Mr. Shoultz, have you ever had any type of communications with individuals working in or [for] any department of Radio Havana?

Mr. Shoultz, have you ever received any messages from persons whom you knew or believed to be representatives of the Castro Cuban Government?

Mr. Shoultz, have you ever listened to Radio Havana broadcasts?

Mr. Shoultz, do you desire to make any statement?[1]

In October 1967, the Office of the Assistant Secretary of Defense advised petitioner that his refusal to answer the questions addressed to him during the interview had denied the Screening Board information that it considered essential for it to reach the necessary affirmative finding that a continued clearance would be "clearly consistent with the national interest." His clearance was therefore suspended in accordance with Section V(B), subject to restoration upon application to the Office of the Assistant Secretary of Defense and a final, favorable determination by that office. (R. 41–43.)

Petitioner then amended his complaint in this action, and the district court issued a temporary re-

[1] The 23-page transcript of the interview was introduced by the petitioner as an exhibit in the district court (see R. 48–49). A copy is being lodged with the Clerk of this Court.

straining order enjoining the suspension of his security clearance pending further order of the court. It subsequently entered a permanent injunction against use of the suspension procedure of Section V(B) in petitioner's case. Upon appeal, the court of appeals reversed the district court, vacating the injunction. The court of appeals has stayed its mandate pending disposition of the case in this Court.

ARGUMENT

We believe there can be no doubt of the constitutional validity of a requirement that an individual seeking to obtain or retain a right of access to classified defense information must cooperate with an investigation of his eligibility, at the risk of being denied access if he refuses to provide information relevant to the inquiry. Such requirements have consistently been upheld by the courts, including this Court. Similarly, there can be no question that the Secretary of Defense, in connection with his overall responsibility for safeguarding access to classified defense information, has authority to adopt procedures suspending the processing of clearance questions when an individual's refusal to cooperate obstructs decision in his case. Therefore, the only substantial issues to be raised in a case like the present one are whether the information sought was relevant to the inquiry, and whether the particular procedures adopted satisfied any constitutional requirements regarding notice, hearing, and review on the question of relevance. We submit that the facts of this case raise no issue either as to the

relevance of the questions asked petitioner—which was and is plain—or as to the notice given him at the time of the interview. In any event, petitioner, both here and below, has chosen a sweeping attack on the investigative procedures specified in the Directive, and has not focussed upon any particular grievance arising from the facts of his case. Since the court below was correct, and there is no conflict with the decisions of this or any other court, the petition for a writ of certiorari should be denied.

1. The constitutionality of procedures which suspend the processing of applications for government licenses or other benefits upon failure to supply relevant requested information is firmly established. *Gardner* v. *Board of Public Works,* 341 U.S. 716, 720; *Beilan* v. *Board of Education,* 357 U.S. 399, 405; *Lerner* v. *Casey,* 357 U.S. 468; *Nelson* v. *County of Los Angeles,* 362 U.S. 1, 7–8; *Konigsberg* v. *State Bar,* 366 U.S. 36; *In re Anastoplo,* 366 U.S. 82; *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation,* 392 U.S. 280; *Gardner* v. *Broderick,* 392 U.S. 273. The last two opinions cited essentially adopted the decisive concurrence in *Spevack* v. *Klein,* 385 U.S. 511, 519, which, while agreeing that the Fifth Amendment was available to lawyers in disciplinary proceedings, found no such right of silence in a public employee asked to answer questions by his employer directly related to the performance of his duties. And see *Beilan, supra,* 357 U.S. at 405. Petitioner's privilege of access to classified national defense information is founded on an even more

demanding relationship of trust and confidence—with correspondingly greater obligations of candor—than is the position of an ordinary public employee.

It is significant in this respect that the grant or continuance of security clearance at all times depends on the affirmative conclusion that it is clearly consistent with the national interest. E.O. 10865, § 2, App. p. 23, *infra.* As is appropriate to the important national security interests involved, the privilege of access never transmutes into a "right" which can be taken away only upon a showing of ineligibility by the government. The regulations, therefore, properly draw no distinction between the procedures applicable to denial of an initial application for clearance and to revocation of an existing clearance. The obligation is always upon the applicant for clearance to provide requested information pertinent to a determination of his continued eligibility. Thus, this is an *a fortiori* case in comparison with such cases as *Borrow* v. *Federal Communications Commission,* 285 F. 2d 666 (C.A.D.C.), certiorari denied, 364 U.S. 892, and *Cronan* v. *Federal Communications Commission,* 285 F. 2d 288 (C.A.D.C.), certiorari denied, 366 U.S. 904, which upheld the dismissal of initial *and renewal* applications for radio operator licenses on the grounds that the applicants had refused to provide material information. Indeed, even where applicants for license renewal interposed specific constitutional objections to a question (as was not done here) a refusal to renew was found proper:

> [W]hen [an applicant] seeks a license at the hands of an agency acting under the standard of the public interest, and information substantially relevant to that standard is withheld under the privilege, as may be done, the need for the information and the cooperation of the applicant with respect to it remains. * * * The Commission cannot be required to act on his application without the relevant light he can supply and which the Commission is authorized to seek. [*Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276, 279 (C.A.D.C.), certiorari denied, 373 U.S. 951.]

And see *Schneider* v. *Roland*, 263 F. Supp. 496 (W.D. Wash.), reversed on other grounds *sub nom. Schneider* v. *Smith*, 390 U.S. 17; 18 C.F.R. 4.31 (Federal Power Commission); 14 C.F.R. 201.4(c) (Civil Aeronautics Board).[2]

It follows that the claimed right to refuse to give the responsible officials relevant factual information

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[2] The requirement that petitioner establish his qualifications for clearance is entirely consistent with this Court's decision in *Speiser* v. *Randall*, 357 U.S. 513. While the Court there held it improper to cast on an applicant for a veteran's preference the burden of proving that he did not advocate forcible overthrow of the government, it carefully distinguished cases such as *Gardner*, *supra*. Those cases, it pointed out,

> concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. [357 U.S. at 527.]

The same factors distinguish the present case.

relating to present eligibility for clearance is unequal to the government's interest in restricting access to important national security information [3] to persons unquestionably qualified to enjoy such access.

Because the Section V(B) investigatory procedure is part of a screening process *preceding* hearing, petioner's discussion of procedural due process requirements *at* a hearing is misplaced. As the court of appeals discussed at length, investigatory procedures are necessarily different from the procedures at adjudicatory hearings. *Hannah* v. *Larche,* 363 U.S. 420, 442–443, 446. And in the actual administration of the security program, preliminary investigations by the Screening Board and hearings on the charges that may arise from such an investigation are separate and distinct phases (see pp. 3–4, *supra*).[4] The issue here is

[3] Petitioner is seeking to hold a Secret clearance. "Secret" information is defined by Executive Order 10501, Section 1(b), 18 Fed. Reg. 7049, 7051, as:

> * * * defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

[4] Of 728 security "clearance matters closed" by the Department of Defense in 1968, we are informed, 566 were closed at the Screening Board level, 116 by Hearing Examiners (after Statements of Reasons had been formulated and E.O. 10865 hearings convened), and 46 by the Appeals Board. Forty-four of the cases heard by the Hearing Examiners, and 16 of the Appeals Board cases resulted in findings that the grant of

not whether petitioner is being denied a hearing, but whether he has the privilege of retaining his clearance while refusing to cooperate with an investigation to determine whether or not there must be a hearing to decide upon revocation of his clearance.

2. There can be no serious question regarding the authority of the Secretary of Defense and his delegates to require information they deem relevant to security clearances, and to refuse to process applications for clearance (including questions of continued clearance) if that information is not forthcoming. Such authority and responsibility for the protection of official information affecting the national security was first granted by Executive Order 10501, 18 Fed. Reg. 7049.

> * * * This Presidential Order established a comprehensive program for the classification, marking, custody, dissemination, and transmission of official information relating to the national defense. The Order *directed departments and agencies having direct responsibility for the national defense to classify such material and control its subsequent dissemination* in accordance with the standards and procedures stated in the order. The Order made it clear that classified material was to be made available only to "authorized persons, in or out of

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security clearance was clearly consistent with national interests. (Two hundred and six cases in the Screening Board resulted in the same conclusion.) It is thus clear that the Board does serve an important screening function, without impeding the hearings E.O. 10865 requires.

> federal service," [§ 5(i)] and that *it was the duty of the Department* involved to see that "unauthorized persons are prevented from gaining access thereto," [§ 6] as the Order stated, "by sight or sound." [§ 6(e)] More specifically, the Order directed that "knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy," [§ 7] and that "classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department * * *. [§ 7(b)] [*Ogden* v. *United States*, 303 F. 2d 724, 729 (C.A. 9); emphasis supplied.]

That authority and responsibility was restated by Executive Order 10865, 25 Fed. Reg. 1583, which directs the heads of Executive Departments to issue regulations protecting the release of classified information within industry, E.O. 10865, § 1(a). Expanding on E.O. 10501's directive that classified information be disseminated only to those individuals "determined to be trustworthy" (§ 7), E.O. 10865 states that authorization for access to classified information "may be granted by the head of a department or his designee" to an individual "*only* upon a finding that it is clearly consistent with the national interest to do so" (§ 2, emphasis added). The latter order also provides that "[n]othing contained in this order shall be deemed to limit or affect the responsi-

bility and powers of the head of a department to deny or revoke access * * * if the security of the nation so requires." (§ 9).

In short, the power and responsibility to protect classified information flows from the power and responsibility of the President, delegated to the heads of the executive departments. In particular, Section 1(a) of E.O. 10865 provides:

> The * * * Secretary of Defense * * * shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as [he] consider[s] necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that [he has] responsibility for safeguarding. * * *

The Secretary promulgated Section V(B) in compliance with the responsibility thus given him. Since E.O. 10865 requires him to allow access only if he affirmatively finds it clearly consistent with the national interest, he is also required, necessarily, to obtain all information that is pertinent to such a finding. That information cannot be obtained without cooperation by the individual seeking access in providing the relevant information in his possession. Therefore, the delegated power, and particularly the responsibility to "prescribe such specific requirements, restrictions, and other safeguards" as are appropriate to protect classified information necessarily includes the power to

establish procedures such as those in Section V(B) as the framework for securing the essential information.

Greene v. *McElroy*, 360 U.S. 474, on which petitioner relies for his claim that specific authorization is lacking in this case, is inapposite. None of the programs and procedures involved in that case "was the creature of statute or of an Executive Order issued by the President." *Id.* at 495. Moreover, the underlying question in *Greene* was whether the government could adopt procedures which in effect deprived persons of their right to follow a chosen profession without their ever having the opportunity to confront and cross-examine those whose evidence was weighed against them. This Court insisted that specific delegation of the power to establish such procedures must be shown, and could not be shown in that context. *Id.* at 506–507. In direct response to *Greene*, the President created the system of procedures here in question, which with the exception of emergency procedures not relevant here, guarantees that the rights at issue in that case will be afforded before any final revocation of clearance occurs. E.O. 10865, §§ 3–5. Mr. Greene sought the opportunity for full and fair examination of the facts of his case at a hearing; petitioner has that opportunity under the Directive, but further asserts an additional right not to cooperate with the government's inquiry while remaining eligible for access to classified information. The difference between the two situations is plain.

3. Petitioner objects that even if a suspension could be authorized in the event of a refusal to provide relevant information, the Section V(B) procedures applied in his case were improper because he allegedly did not receive adequate notice of relevance, and because there was no "hearing officer" present at the interview to rule on objections to relevance as they were made. In accordance with established practice, petitioner was notified by letter in advance of the interview that the interview was to assist in determining his continued eligibility for clearance, that the Screening Board considered "the extent of his participation in Cuban affairs" relevant to its determination, and that Section V(B) (of which a copy was afforded) would apply. As the court below pointed out, the relevance to clearance of any such involvement with Cuba is patent under the eligibility criteria (Pet. App. XIV–XV, n. 6) and the substantive questions asked all related clearly to the announced area. Petitioner was thus on notice as to the reasons why the Screening Board considered the questions asked at the interview to be relevant, and had an opportunity to make the same determination for himself. If in fact petitioner had had any question as to the relevancy of any particular question, he could, immediately after the interview, have brought legal proceedings challenging the Screening Board's determination that those questions were relevant and necessary to continued proceeding of the ap-

plication. But here petitioner makes no such challenge,[5] choosing instead only a sweeping attack on the Section V(B) proceedings; whatever might be the remedy in another case, therefore, it is sufficient here that the relevancy of the questions asked petitioner clearly appears.

Petitioner's reliance on *Watkins* v. *United States,* 354 U.S. 178, is inapt. *Watkins* did not hold, as petitioner seems to assert, that a person subjected to investigative questioning must be afforded an immediate quasi-judicial hearing on the relevance of any question he is required to answer before any action (in that case, a criminal prosecution for contempt) may be based on his refusal to answer. What it held was that if an objection on the ground of irrelevance is made, the refusal to answer cannot be made the basis of a contempt prosecution unless either (1) the subject matter under inquiry is clear or (2) the investigative body states for the record what the subject matter under inquiry is, and how the questions asked relate to it. *Id.* at 214–215. Thus, the teaching of *Watkins* is that an individual must be given sufficient information on which to decide at his peril whether or not to answer a propounded question, not that he must have an opportunity to "try out" the question of relevance before answering. Here, the required information was given and the relevance of the questions asked was apparent; when the investigat-

[5] The only question as to actual relevancy even suggested in the petition relates to the interviewing officer's apparently innocuous inquiry whether Mr. Shoultz was married (Pet. p. 23).

ing officer sought to make a further explanation, petitioner's counsel refused to permit it. *E.g.*, Transcript, pp. 18–19. In facing his decision whether or not to comply, petitioner was in no different position than any individual challenging the authority and validity of laws or regulations. He could refuse to comply on a contention that they were unauthorized, but he faces the consequences if his contention is without merit. *Watkins, supra; Sinclair* v. *United States,* 279 U.S. 263, 297; *Braden* v. *United States,* 365 U.S. 431, 435, 437. Since this reasoning has been applied in upholding criminal penalties, *ibid.*, it clearly governs here, where the only consequence is on the order of a civil contempt remedy—the suspension of clearance pending provision of the required information.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Executive Order 10865

Safeguarding Classified Information Within Industry

Whereas it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

Whereas it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

Whereas I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

Whereas I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interest:

Now, therefore, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

Section 1. (a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, re-

spectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection (a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

(c) When used in this order, the term "head of a department" means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, and, in sections 4 and 8, includes the Attorney General. The term "department" means the Department of State, the Department of Defense, and the Atomic Energy Commission, the National Aeronautics and Space Adminis-

tration, the Federal Aviation Agency, and, in sections 4 and 8, includes the Department of Justice.

SEC. 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SEC. 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SEC. 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency

involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SEC. 5 (a) Records compiled in the regular course of business, or other physical evidence other than investigative reports, may be received and considered subject to rebuttal without authenticating witnesses, provided that such information has been furnished to the department concerned by an investigative agency pursuant to its responsibilities in connection with assisting the head of the department concerned to safeguard classified information within industry pursuant to this order.

(b) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the applicant, may be received and considered provided that: (1) the head of the department concerned or his special designee for that purpose has made a preliminary determination that such physical evidence appears to be material, (2) the head of the department concerned or such designee has made a determination that failure to receive and consider such physical evidence would, in view of the level of access sought, be substantially harmful to the national security, and (3) to the extent that the national security permits, a summary or description of such physical evidence is made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered. In such instances a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SEC. 6. Because existing law does not authorize the Department of State, the Department of Defense, or the National Aeronautics and Space Administration to subpoena witnesses, the Secretary of State, the Secretary of Defense, or the Administrator of the National Aeronautics and Space Administration, or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary or the Administrator, as the case may be, in identifying persons who have made statements adverse to the appli-

cant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination.

SEC. 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

SEC. 8. Except as otherwise specified in the preceding provisions of this order, any authority vested in the head of a department by this order may be delegated to the

(1) Under Secretary of State or a Deputy Under Secretary of State, in the case of authority vested in the Secretary of State;

(2) Deputy Secretary of Defense or an Assistant Secretary of Defense, in the case of authority vested in the Secretary of Defense;

(3) General Manager of the Atomic Energy Commission, in the case of authority vested in the Commissioners of the Atomic Energy Commission;

(4) Deputy Administrator of the National Aeronautics and Space Administration, in the case of authority vested in the Administrator of the National Aeronautics and Space Administration;

(5) Deputy Administrator of the Federal Aviation Agency, in the case of authority vested in the Administrator of the Federal Aviation Agency; or

(6) Deputy Attorney General or an Assistant Attorney General, in the case of authority vested in the Attorney General.

SEC. 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

DWIGHT D. EISENHOWER.

The White House,
February 20, 1960.

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